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7 **UNITED STATES DISTRICT COURT**
8 **WESTERN DISTRICT OF WASHINGTON**
9
10 **AT SEATTLE**

11 **CYNTHIA MCKINNEY,**) Case No.
12)
13 Plaintiff,) **COMPLAINT FOR VIOLATION**
14) **OF FEDERAL FAIR DEBT**
15 vs.) **COLLECTION PRACTICES ACT**
16)
17 **H&P CAPITAL, INC., NOEL**
18 **POOLER AND GARY HENRION,**)
19)
20 Defendants.)

21 **NATURE OF ACTION**

22 1. This is an action brought under the Fair Debt Collection Practices
23 Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*

24 **JURISDICTION AND VENUE**

25 2. This Court has jurisdiction under 15 U.S.C. § 1692k(d) and 28
26 U.S.C. § 1331.

27 3. Venue is proper before this Court pursuant to 28 U.S.C. §1391(b),
28 COMPLAINT FOR VIOLATIONS OF THE FAIR
DEBT COLLECTION PRACTICES ACT-1

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1 where the acts and transactions giving rise to Plaintiff's action occurred in this
2 district, (where Plaintiff resides in this district), and/or where Defendants transact
3 business in this district.
4

5 **PARTIES**

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7 4. Plaintiff, Cynthia McKinney ("Plaintiff"), is a natural person who at
8 all relevant times resided in the State of Washington, County of Snohomish, and
9 City of Everett.
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11 5. Plaintiff is a "consumer" as defined by 15 U.S.C. § 1692a(3).

12 6. Defendant, H&P Capital, Inc. d/b/a HP & Associates ("H&P") is an
13 entity who at all relevant times was engaged, by use of the mails and telephone, in
14 the business of attempting to collect a "debt" from Plaintiff, as defined by 15
15 U.S.C. §1692a(5).
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18 7. Defendant, Noel Pooler ("Pooler") is an individual who at all
19 relevant times was engaged, by use of the mails and telephone, in the business of
20 attempting to collect a "debt" from Plaintiff, as defined by 15 U.S.C. §1692a(5).
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22 8. Defendant, Gary Henrion ("Henrion") is an individual who at all
23 relevant times was engaged, by use of the mails and telephone, in the business of
24 attempting to collect a "debt" from Plaintiff, as defined by 15 U.S.C. §1692a(5).
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1 9. “Employees can be held personally liable under the FDCPA.”
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 3 *Robinson v. Managed Accounts Receivable Corp.*, 654 F. Supp. 2d 1051, 1059
 4 (C.D. Cal. 2009); see *Schwarm v. Craighead*, 552 F. Supp. 2d 1056, 1070-71
 5 (E.D. Cal. 2008).

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 7 10. Furthermore, “most district courts that have addressed the issue have
 8 held that the corporate structure does not insulate shareholders, officers, or
 9 directors from personal liability under the FDCPA.” *Schwarm v. Craighead*, 552
 10 F. Supp. 2d 1056, 1070-71 (E.D. Cal. 2008); see *Kistner v. Law Offices of*
 11 *Michael P. Margelefsky, L.L.C.*, 518 F.3d 433, 437-38 (6th Cir. 2008); *del Campo*
 12 *v. Kennedy*, 491 F. Supp. 2d 891, 903 (N.D.Cal.2006); *Brumelow v. Law Offices*
 13 *of Bennett & Deloney, P.C.*, 372 F.Supp.2d 615, 618-21 (D. Utah 2005);
 14 *Albanese v. Portnoff Law Assocs., Ltd.*, 301 F. Supp. 2d 389, 400 (E.D. Pa. 2004);
 15 *Musso v. Seiders*, 194 F.R.D. 43, 46-47 (D.Conn.1999); *Brink v. First Credit*
 16 *Res.*, 57 F. Supp. 2d 848, 861-62 (D. Ariz. 1999); *Pikes v. Riddle*, 38 F. Supp. 2d
 17 639, 640 (N.D. Ill. 1998); *Ditty v. CheckRite, Ltd.*, 973 F. Supp. 1320, 1337-38
 18 (D. Utah 1997); *Newman v. Checkrite Cal., Inc.*, 912 F. Supp. 1354, 1372 (E.D.
 19 Cal.1995); *Teng v. Metro. Retail Recovery Inc.*, 851 F. Supp. 61, 67 (E.D. N.Y.
 20 1994).

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 24 11. H&P Capital, Inc., Noel Pooler and Gary Henrion (“Defendants”) a

1 “debt collectors” as defined by 15 U.S.C. § 1692a(6).

2 **FACTUAL ALLEGATIONS**

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4 12. Plaintiff is a natural person obligated, or allegedly obligated, to pay a
5 debt owed or due, or asserted to be owed or due a creditor other than Defendants.

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7 13. Plaintiff's obligation, or alleged obligation, owed or due, or asserted
8 to be owed or due a creditor other than Defendants, arise from a transaction in
9 which the money, property, insurance, or services that are the subject of the
10 transaction were incurred primarily for personal, family, or household purposes.
11 Plaintiff incurred the obligation, or alleged obligation, owed or due, or asserted to
12 be owed or due a creditor other than Defendants.
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15 14. Defendants use instrumentalities of interstate commerce or the mails
16 in a business the principal purpose of which is the collection of any debts, and/or
17 regularly collects or attempts to collect, directly or indirectly, debts owed or due,
18 or asserted to be owed or due another.
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21 15. Defendants, via their agent and/or employee “Ms. Dixon,” placed a
22 call to Plaintiff’s work telephone on November 3, 2010 @ 10:29 A.M. a time or
23 place Defendants knew, or should have known, to be inconvenient for Plaintiff,
24 and at such time, left a message in which Defendants failed to notify Plaintiff that
25 the communication was from a debt collector. (15 U.S.C. §§ 1692c(a)(1),
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1 1692e(11)).

2 16. Defendants, via their agent and/or employee “Ms. Dixon,” made
3
4 initial contact with Plaintiff via telephone call on November 3, 2010 @ 10:29
5 A.M., and at such time, failed to provide Plaintiff with the notices required by 15
6 USC § 1692g, and failed to provide Plaintiff with such notices in writing within 5
7 days thereof. (15 U.S.C. § 1692g(a) et seq.).
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10 **15 U.S.C. §1692(d)(6)**

11 17. The FDCPA at section 1692d(6) provides:

12 A debt collector may not engage in any conduct the
13 natural consequence of which is to harass, oppress, or
14 abuse any person in connection with the collection of a
15 debt. Without limiting the general application of the
16 foregoing, the following conduct is a violation of this
17 section:
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21 * * *

22 (6) Except as provided in section 1692b of this title, the
23 placement of telephone calls without meaningful
24 disclosure of the caller’s identity.
25
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27 15. U.S.C. § 1692d(6).

1 18. “Section 1692d(6) . . . requires a debt collector to disclose the
2 caller’s name, the debt collection company’s name, and the nature of the debt
3 collector’s business.” *Baker v. Allstate Financial Services, Inc.*, 554 F.Supp.2d
4 945, 949-50 (D. Minn. 2008).

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7 19. A debt collector necessarily violate[s] § 1692d(6) when [it] fail[s] to
8 disclose [its] identity as a debt collector and the nature of the call when [it leaves]
9 a message on [a] plaintiff’s voice mail.” *Costa v. National Action Financial*
10 *Services*, 634 F. Supp. 2d 1069, 1075 (E.D. Cal. 2007); see also *Hutton v. C.B.*
11 *Accounts, Inc.*, 2010 WL 3021904, *3 (C.D. Cal. 2010) (“Defendant cites no
12 authority to support its argument that leaving an employee’s first name and return
13 telephone number are sufficient as a matter of law for meaningful disclosure
14 under the FDCPA”).

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18 20. “[M]eaningful disclosure requires more than merely disclosing an
19 alias.” *Savage v. NIC, Inc.*, 2009 WL 2259726, *3 (D. Ariz. 2009). “Meaningful
20 disclosure requires that the caller state his or her name and capacity, and disclose
21 enough information so as not to mislead the recipient as to the purpose of the
22 call.” *Hosseinzadeh v. M.R.S. Associates, Inc.*, 387 F. Supp. 2d 1104, 1115 (C.D.
23 Cal. 2005); *Koby v. ARS Nat. Services, Inc.*, 2010 WL 1438763, *4 (S.D. Cal.
24 2010).

15 U.S.C. §1692(e)(11)

21. The FDCPA at section 1692e(11) provides:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

15 U.S.C. §1692e(11).

1 22. “The provisions of the FDCPA are clear that in initial or subsequent
2 communications, it must be disclosed that the communication is from a debt
3 collector.” *Drossin v. Nat’l Action Financial Services, Inc.*, 641 F. Supp. 2d
4 1314, 1319 (S.D. Fla. 2009).

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6 23. “A collection agent must follow the disclosure requirement of
7 identifying himself as a debt collector in all communications.” *Masciarelli v.*
8 *Richard J. Boudreau & Associates, LLC*, 529 F. Supp. 2d 183, 186 (D. Mass.
9 2007); *Winberry v. United Collection Bureau, Inc.*, 692 F. Supp. 2d 1279, 1292
10 (M.D. Ala. 2010) (“This court is persuaded that the plain language of the statute
11 as it now reads, having been amended, requires a debt collector to identify in
12 subsequent communications that he is a debt collector”); *Pipiles v. Credit Bureau*
13 *of Lockport*, 886 F. 2d 22, 26 (2d Cir. 1989) (“[W]e must now address the
14 question left open in *Emanuel* and determine whether the Notice, a follow-up
15 communication, was also required to comply. We hold that it was, and therefore
16 rule that *Pipiles* has established a violation of section 1692e(11).”); *Frey v.*
17 *Gangwish*, 970 F. 2d 1516, 1520 (6th Cir. 1992) (“follow-up communications are
18 subject to the disclosure requirements of section 1692e(11)”); *Carroll v. Wolpoff*
19 *& Abramson*, 961 F. 2d 459, 461 (4th Cir. 1992), cert. denied, 113 S. Ct. 298
20 (1992) (holding that follow-up notices are subject to the disclosure requirements
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1 of section 1692e(11)); *Dutton v. Wolpoff & Abramson*, 5 F. 3d 649, 654 (3d Cir.
2 1993) (rejecting Pressley because it “changes the clear and unambiguous
3 language ‘all communications’ and substitutes the more limited phrase ‘some
4 communications.’”))

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7 24. Voice messages from debt collectors to debtors are
8 “communications” regardless of whether a debt is mentioned in the message.
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10 *Hutton v. C.B. Accounts, Inc.*, 2010 WL 3021904, 2-3 (C.D. Cal. 2010) (“[A] debt
11 collector’s failure to identify itself as such in initial and subsequent
12 communications, be they oral or written, with a debtor is a violation of the
13 FDCPA.”); *Savage v. NIC, Inc.*, 2009 WL 2259726, *3 (D. Ariz. 2009) (“the
14 Court finds that leaving a phone message constitutes the placement of a telephone
15 call under § 1692d(6).”); *Berg v. Merchants Assoc. Collection Div., Inc.*, 586 F.
16 Supp. 2d 1336, 1340-1341 (S.D. Fla. 2008) (“Although debt collectors are to
17 refrain from mentioning the debt when communicating with third parties, they
18 must indicate to the consumer their identity, that the debt collector is attempting
19 to collect a debt, and that any information obtained would be used for that
20 purpose.”) (citing *Belin v. Litton Loan Servicing, LP*, 2006 WL 1992410 *4
21 (M.D. Fla. 2006) (“[M]essages left on answering machines that did not directly
22 convey information about a debt were still communications under the FDCPA,
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1 because they conveyed information about a debt indirectly, since the purpose of
2 the message is to get the debtor to return the call to discuss the debt.”)); *Foti v.*
3 *NCO Fin. Sys.*, 424 F. Supp. 2d 643, 655-56 (S.D. N.Y. 2006) (“Thus, given the
4 choice of language by Congress, the FDCPA should be interpreted to cover
5 communications that convey, directly or indirectly, any information relating to a
6 debt, and not just when the debt collector discloses specific information about the
7 particular debt being collected.”); *Hosseinzadeh*, 387 F. Supp. 2d at 1115-16
8 (“[M]essages left by defendant on plaintiff’s answering machine constitute
9 “communications.”) (citing FTC Staff Commentary on FDCPA, 53 Fed. Reg.
10 50103 (Dec. 13, 1988) (rejecting contentions that “contacts that do not explicitly
11 refer to the debt are not ‘communications’ and, hence, do not violate any
12 provision where that term is not used” and concluding that some contacts that do
13 not mention debt may refer to the debt “indirectly,” thereby constituting
14 communications)).

21 **COUNT I**
22 **DEFENDANT H&P**

23 25. Plaintiff repeats and re-alleges each and every allegation contained
24 above.

26 26. Defendant violated the FDCPA as detailed above.

1 WHEREFORE, Plaintiff prays for relief and judgment, as follows:

- 2 a) Adjudging that Defendant violated the FDCPA;
- 3
- 4 b) Awarding Plaintiff statutory damages, pursuant to 15 U.S.C. §1692k,
- 5 in the amount of \$1,000.00;
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- 7 c) Awarding Plaintiff actual damages, pursuant to 15 U.S.C. §1692k;
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- 9 d) Awarding Plaintiff reasonable attorneys' fees and costs incurred in
- 10 this action;
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- 12 e) Awarding Plaintiff any pre-judgment and post-judgment interest as
- 13 may be allowed under the law;
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- 15 f) Awarding such other and further relief as the Court may deem just
- 16 and proper.

17 **COUNT II**

18 **DEFENDANT POOLER**

19 27. Plaintiff repeats and re-alleges each and every allegation contained

20 above.

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22 28. Defendant violated the FDCPA as detailed above.

23 WHEREFORE, Plaintiff prays for relief and judgment, as follows:

- 24 g) Adjudging that Defendant violated the FDCPA;
- 25
- 26 h) Awarding Plaintiff statutory damages, pursuant to 15 U.S.C. §1692k,
- 27

1 in the amount of \$1,000.00;

2 i) Awarding Plaintiff actual damages, pursuant to 15 U.S.C. §1692k;

3
4 j) Awarding Plaintiff reasonable attorneys' fees and costs incurred in
5 this action;

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7 k) Awarding Plaintiff any pre-judgment and post-judgment interest as
8 may be allowed under the law;

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10 l) Awarding such other and further relief as the Court may deem just
11 and proper.

12 **COUNT III**
13 **DEFENDANT HENRION**

14 29. Plaintiff repeats and re-alleges each and every allegation contained
15 above.
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17 30. Defendant violated the FDCPA as detailed above.
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19 WHEREFORE, Plaintiff prays for relief and judgment, as follows:

20 m) Adjudging that Defendant violated the FDCPA;

21
22 n) Awarding Plaintiff statutory damages, pursuant to 15 U.S.C. §1692k,
23 in the amount of \$1,000.00;

24 o) Awarding Plaintiff actual damages, pursuant to 15 U.S.C. §1692k;

25
26 p) Awarding Plaintiff reasonable attorneys' fees and costs incurred in
27

q) Awarding Plaintiff any pre-judgment and post-judgment interest as may be allowed under the law;

r) Awarding such other and further relief as the Court may deem just and proper.

Plaintiff is entitled to and hereby demands a trial by jury.

s/Jon N. Robbins
Jon N. Robbins
WEISBERG & MEYERS, LLC
Attorney for Plaintiff